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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District of Mississippi

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

INTRODUCTION

The facts establishing Mississippi's violation of Section 5 of the Voting Rights Act are straightforward. The State's original plan for implementing the NVRA, set forth primarily in a November 1994 NVRA implementation manual, was submitted for Section 5 preclearance, but the State's subsequent plan, established through the State's February 10, 1995, memorandum, was not submitted for preclearance. Mississippi currently is not implementing the NVRA procedures for which it obtained Section 5 preclearance, and Mississippi did not obtain preclearance for the procedures it is now implementing. The State's responsibility, contrary to appellees' theory, is not to search for a scapegoat for the current state of affairs, but to submit for Section 5 preclearance the procedures the State

decided to implement following the tabling of proposed legislation by a state senate committee on January 25, 1995. None of the appellees' arguments overcome the conclusion, mandated by the express language of Section 5 and this Court's decisions, that the State's administration of unprecleared voter registration procedures violates Section 5.

I. MISSISSIPPI HAS NOT RECEIVED PRECLEARANCE FOR ITS CURRENT REGISTRATION PRACTICES.

Appellees' brief confirms key facts establishing the State's violation of Section 5. Appellees now agree that "[t]he State's designation of agencies to be utilized in implementation, the procedures to be utilized by those agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms may have required Section 5 preclearance." Brief for Appellees at 15. The State's only Section 5 submission of these procedures, however, was the Secretary of State's December 1994 submission. That submission plainly contemplated a unitary system of voter registration and included no procedures or instructions distinguishing NVRA registrants from other registrants for purposes of state and local elections. Brief for Appellants at 7-11.[1]

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[1] As the Mississippi Attorney General's February 10, 1995, memorandum acknowledged, "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections." J.S. App. 21a; *see also* J.S. App. 7a. That assumption would be natural because the State's NVRA plan, implemented as of January 1, 1995, made no distinction between eligibility for federal and state elections.

Appellees are thus forced to argue that the nature of the Secretary of State's NVRA submission changed automatically when proposed state legislation was tabled on January 25, 1995, and that the submission changed in precisely the manner necessary to secure preclearance of the State's current federal-election-only NVRA procedures -- all without any further Section 5 submission by the State. All of this was accomplished, according to appellees' theory, because the Attorney General knew of the senate committee's action. *See* Brief for Appellees at 29-30 ("The Attorney General made a knowing choice to preclear administrative changes after she knew the proposed legislation had been defeated.") This argument fails for several reasons.

First, appellees misapprehend settled authority by arguing that the United States Attorney General had the burden to inquire "what the effect of the defeat of the legislative package would have been" and to "require[] a proper submission restricted only to *completed* changes." Brief for Appellees at 32. Section 5 places on the covered jurisdiction, not the U.S. Attorney General, the burden of removing ambiguities and making a proper submission. *Clark v. Roemer*, 500 U.S. 646, 658-659 (1991); *McCain v. Lybrand*, 465 U.S. 236 (1984).

Appellees argue that *Clark* and *McCain* are distinguishable because in this case the Attorney General would have "violated her own regulation" by preclearing "legislative changes that had not yet occurred." Brief for Appellees at 31. But the Attorney General did no such thing. The Justice Department's February 1, 1995, preclearance letter specifically identified "the publications of the Office of the Mississippi Secretary of State" as the submission being precleared. J.S. App. 15a. It further advised the State that if legislation were later enacted it would have to be submitted separately for preclearance. J.S. App. 17a. However, because the State clearly announced its intent to

begin implementing its NVRA plan *before* the legislature acted, the Attorney General properly requested a Section 5 submission of those changes, and it was the State's duty to submit them, whether implemented administratively or through legislation.[2]

By contending that no Section 5 submission of Mississippi's NVRA procedures should have been made or considered until legislation was enacted, Mississippi is saying, in effect, that it should have been free to implement unprecleared changes so long as they were not enacted by the legislature. That disregards the express language of Section 5, which covers not only changes in statutory enactments, but also any "standard, practice or procedure" with respect to voting,

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[2] Appellees contend that the Attorney General's February 1, 1995, letter precleared two changes that could have been accomplished only through legislation, therefore proving that the Attorney General must have been attempting to preclear the unenacted legislation. Brief for Appellees at 16. The changes cited by appellees are the elimination of the attesting witness requirement from the state mail-in form and elimination of the state's purge for nonvoting. *Id.* Appellees' interpretation is incorrect. Both of these changes were expressly set forth in the November 1994 implementation manual, J.A. 30, 35, for which the Secretary of State requested preclearance, J.A. 109-110. Furthermore, the revised mail-in form, which omitted the attesting witness requirement, was also submitted for preclearance, J.A. 50. The fact that these changes were *also* included as part of the proposed state legislation is immaterial; so were numerous other changes that the state now concedes were the proper subject of the Attorney General's Section 5 review, Brief for Appellees at 15, including the designation of agencies where registration was to be conducted, the procedures to be used by those agencies, and the manner of transmitting forms to the circuit clerks. Attach. E., U.S. Summ. Judg. Mot. (proposed legislation, Sections 1 and 2). The appellees' artificial distinction between "two basic types [of changes], administrative and legislative," that purportedly were contemplated in the State's NVRA implementation plan, Brief for Appellees at 3, is simply a post-hoc characterization that is not reflected in the materials for which submission was requested.

and any changes that covered jurisdictions "seek to administer." 42 U.S.C. § 1973c. It also directly thwarts the purposes of Section 5. "Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law." S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 47, *quoted in NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 132 n.19 (1985).

Second, it is implausible to suggest that the U.S. Attorney General actually carried out her duty of evaluating the possible discriminatory purpose or effect of a dual registration requirement for NVRA registrants, and knowingly precleared such procedures, based on the submission that was before the Attorney General. The State did not even announce its procedures for implementing the NVRA on a federal-election-only basis until February 10, 1995, ten days after the Attorney General issued her preclearance letter. Appellees' theory thus assumes that the *concept* of a federal-election-only plan was evaluated and precleared, without submission or preclearance of any of the *procedures* through which such a plan must be implemented.[3] It assumes, for example, that the Attorney

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[3] Implementing the NVRA for federal elections only, while requiring separate registration for state and local elections, required a variety of new procedures, including procedures to distinguish NVRA registrants from other registrants on the voter rolls, procedures to notify registrants of their ineligibility for state and local elections, procedures for offering re-registration opportunities for state and local elections, and procedures limiting the NVRA's purge and list-maintenance requirements to federal elections. J.S. App. 20a-23a (memorandum of February 10, 1995). For those already placed on the books for all purposes in early 1995, the State also had to determine the procedures for canceling their registrations for state and local elections. These practices were addressed in the State's February 10, 1995, memorandum, but were not addressed at all in the Section 5 submission. The State therefore cannot argue that it has received preclearance for these practices.

General would knowingly preclear voter registration forms for use in a federal-election-only system, when those forms do not even mention that the voter will be eligible to vote only in federal elections. *See McCain v. Lybrand*, 465 U.S. at 254 (noting that "it would require a wild flight of imagination" to assume the 'Attorney General properly evaluated the discriminatory purpose or effect of a change not specifically identified in the submission).

Third, Mississippi's proposed rule of construction -- under which the scope of a preclearance determination depends upon post-hoc analysis of whether the Attorney General could have requested additional information before preclearing a submitted change -- would backfire on covered jurisdictions by bringing the Section 5 preclearance process to a standstill. The Attorney General would be forced to reject many more submissions and to delay final preclearance determinations because of possible uncertainty about the implications of unsubmitted changes. This Court's consistent rule that preclearance extends only to changes specifically and unambiguously identified by the covered jurisdiction ultimately benefits not only the citizens protected by Section 5, but the covered jurisdictions themselves, by making possible an expeditious administrative preclearance process for those changes that are specifically identified.

Fourth, it greatly overstates the case to say that, prior to the preclearance determination, "the proposed [state] legislation had been defeated," Br. at 30, much less that the U.S. Attorney General so understood. Tabling of legislation in committee is not the same thing as "defeat" of legislation. In fact, even the State's February 10, 1995, memorandum acknowledged that further legislative action in 1995, though perhaps unlikely, was still possible, J.S. App. 21a; *see also* J.A. 115 (noting possibility of further legislative action). If the Attorney General

had delayed in granting preclearance, and the legislation then had been brought to the floor late in the session and enacted, Mississippi would have faced an entirely different set of problems because of the extended period during which registration would have been conducted under unprecleared procedures. Had that scenario transpired, Mississippi no doubt would now be expressing outrage over the delay in preclearance. Viewed from the perspective of the Attorney General in January 1995, rather than appellees' hindsight perspective, preclearance of the submission then before the Attorney General was appropriate and cannot be read to cover changes not submitted at the time.[4]

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[4] Appellees have tacitly conceded the ambiguity of the Section 5 submission by shifting their own position concerning what NVRA procedures were properly submitted and precleared. In their Motion to Affirm, appellees stated that the only "choices" that might require submission were "[t]he State's choices regarding discretionary agencies which will be utilized in implementation, and the States' choices regarding purging procedures," insisting that "[a]ll the other items" in the Section 5 submission were "superfluous for Section 5 purposes." Motion to Affirm at 9. Now, appellees acknowledge that a few more of these so-called "superfluous" items may in fact have been required to be submitted and precleared, including "the procedures to be utilized by [the] agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms." Brief for Appellees at 15. Appellants submit that appellees' list of changes requiring preclearance is still too short because it excludes, *inter alia*, the crucial procedures establishing limited eligibility for NVRA registrants. In any event, if the State's position concerning what was and was not properly submitted to and considered by the United States Attorney General shifts from brief to brief, based on months of opportunity to ponder the question, the State can hardly argue that its Section 5 submission was unambiguous from the perspective of the United States Attorney General, who was required to act within a 60-day deadline while simultaneously considering hundreds of other Section 5 submissions.

Fifth, the State's theories are self-contradictory. If the official who made the Section 5 submission was indeed acting as an "errant" and "rogue" employee (Brief for Appellees at 14, 24), who "incorrectly anticipated" that a unitary NVRA registration plan would be approved by the state legislature (Br. at 23), it is illogical to argue at the same time that the Section 5 submission was somehow adequate to identify and secure preclearance of the state's current federal-election-only plan. If the Section 5 submission was based on the Secretary of State's allegedly misguided view that a unitary system was to be implemented, it follows that the preclearance determination was based on the same understanding, whether misguided or not. Compliance with Section 5 therefore requires that Mississippi now submit for preclearance the NVRA plan it does wish to implement.

II. MISSISSIPPI'S PRACTICES ARE NOT EXEMPT FROM PRECLEARANCE.

A. Mississippi's Changes in Voting Practices to Implement a Federal-Election-Only NVRA Plan Are Not Exempt from Section 5 Coverage.

Because Mississippi has not received preclearance for its current registration practices, it must submit them for preclearance unless they are exempt from coverage. Appellees argue in Parts C and D of their Brief that the bare decision or "choice" to implement the NVRA only for federal elections does not require preclearance, characterizing this as "a decision to make no change." Brief for Appellees at 26. They acknowledge that "[i]f the State had adopted changes in its State voting requirements, those changes would have been subject to preclearance." *Id.* at 33. Appellees assert, however, that "the existence of a separate, federal-only, registration system does not require preclearance," Br. at 32, heading D

(capitalizations omitted), because "[t]his condition is brought about by federal law." *Id.* at 33.

Appellees' argument rests on a fiction: that states need not submit changes in voting practices or procedures for preclearance unless they make changes in their statutory law. The State clearly did adopt changes in its "voting requirements," *cf.* Brief for Appellees at 33, under the inclusive definition set forth in the Voting Rights Act, which covers not only statutes but any "standard, practice or procedure" with respect to voting. 42 U.S.C. 1973c; *see, e.g.*, n.3, *supra*. The State's failure to enact legislation in response to the NVRA thus does not alter the State's responsibility to submit for Section 5 preclearance the changes it actually has made in its registration practices. Appellants do not argue that a bare decision not to enact new legislation is covered by Section 5, but they do argue that the State must submit for preclearance the procedures it *is* administering which implement the NVRA as a federal-election-only system, as set forth in the State's February 10, 1995, memorandum. Moreover, in making the preclearance determination the Attorney General is entitled to examine the effect that the federal-election-only system will have on minority registration and participation in the entire election process, which includes state and local elections, regardless whether the State alters its registration procedures for such elections. *See City of Lockhart v. United States*, 460 U.S.125, 131-132 (1983) (changes must be evaluated in context of entire election system which they affect); Brief for Appellants at 29. That examination can be made only when Mississippi finally submits its federal-election-only procedures for preclearance to the Attorney General or the D.C. District Court.

Further, the State did choose effectively to alter its statutory requirements when it decided to implement the NVRA only for federal elections, because Mississippi statutory law

currently provides for a unitary registration system. Miss. Code Ann. § 23-15-11. Prior to 1995, and prior to issuance of the State's February 10, 1995, memorandum, circuit clerks had no authority to prevent any class of registered voters from voting in state and local elections. While the NVRA does not require states to use NVRA procedures for state and local elections, it is equally true that the NVRA does not require Mississippi to abandon its important state policy of having a unitary registration system. The alteration of that policy is a change implemented by Mississippi and requires preclearance.[5]

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[5] The only state-law registration provision that Mississippi has identified as a bar to full eligibility for NVRA registrants is the state requirement of an attesting witness' signature on mail-in registration forms. The NVRA registration forms contain all of the information that is required to determine if a voter is qualified as an elector under Mississippi law, fully complying with the conditions that Mississippi imposes for eligibility (*e.g.*, age, citizenship, 30-day residency, absence of conviction for disqualifying crimes, mental competence; *see* Miss. Code Ann. § 23-15-11). Arguably, Mississippi law does not even require the signature of an attesting witness as an absolute precondition to registration, because the list of reasons for which mail-in applications may be rejected by registrars does not specifically include the absence of an attesting witness signature; an incomplete application is cause for rejection only if the omission "makes it impossible for the registrar to determine the eligibility of the applicant to register." Miss. Code Ann. § 23-15-47(2)(d)(i). Further, since NVRA registrants typically register in person at drivers' license offices and other designated agencies, the justification for treating those forms as *mail-in* forms requiring an attesting witness is unclear. Without changing state law at all, agency officials could be appointed as deputy registrars authorized to accept in-person registrations. Miss. Code Ann. § 23-15-223. In any event, assuming the NVRA forced Mississippi to depart from *either* its unitary registration policy, *or* its more technical requirement of an attesting witness signature on mail-in forms, Mississippi's decision to alter its unitary registration policy is indeed the proper subject of Section 5 review.

In arguing that "conditions initiated and required by *federal* law are not within the scope of Section 5 coverage," Br. for Appellees at 14, appellees persist in ignoring this Court's decisions. Appellees still refuse to cite or discuss *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), even though that decision squarely refutes the district court's holding that, in performing a "nondiscretionary act required by federal law," Mississippi was exempt from the preclearance requirement J.S. App. 9a. *See* Brief for Appellees at 41-44.

Appellees' complaints about "bootstrapping" the NVRA and Section 5, and their strained effort to invoke *Miller v. Johnson*, 115 S. Ct. 2475 (1995), Brief for Appellees at 28, are unfounded. The requirement that states comply with Section 5 when implementing the NVRA is found in the NVRA itself, which expressly provides that the NVRA's requirements do not "supersede, restrict or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). Section 5 does not interfere with a state's decision to apply the NVRA only to federal elections *unless* the practices and procedures adopted by the state are racially discriminatory in purpose or effect. Mississippi's history of racial discrimination in voting is probably the best illustration of why Congress rejected the option of exempting NVRA-related changes from Section 5 review.[6] To appellants' knowledge,

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[6] Appellees argue in a footnote that implementation of the NVRA as a federal-only system will not amount to retrogression. Br. for Appellees at 27 n.4. However, the fact-bound question of whether Mississippi's chosen procedures will be discriminatory in effect, or were adopted for a discriminatory purpose, is precisely the question reserved to the Attorney General or the D.C. District Court in the first instance, and Mississippi needs to submit its procedures immediately to one of those authorities so that determination can be made. In any event, it is entirely speculative to argue that, under the State's new procedures, "the number registered to

Mississippi is also the only covered jurisdiction that is insisting it need not submit its NVRA-related changes for Section 5 preclearance. The parade of horribles that appellees invoke if Section 5 preclearance is required here is thus highly unrealistic; Mississippi is already the last straggler in the parade. *Cf.* Attach. S, U.S. Mot. For Summ. Judg., Declaration of Barry H. Weinberg, Deputy Chief, Voting Section, ¶ 3 (noting that Justice Department had received 40 NVRA-related submissions from 14 covered states or jurisdictions as of June 23, 1995).

B. Mississippi's "Unratified Act" Theory Is Incorrect and Does Not Exempt the State's Voting Changes from Section 5 Coverage.

Appellees devote much of their Brief to arguing that the unitary NVRA plan that officials began implementing in January 1995 should not be the "benchmark" for "retrogression" because it was not ratified by the legislature or governor. *See, e.g.*, Brief for Appellees at 21. They make two basic sets of arguments on this point: one, that any implementation of NVRA procedures on a unitary basis -- that is, for state and local elections as well as federal elections -- should be disregarded because the Secretary of State lacked authority to

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vote in federal elections will increase" and the number registered to vote in State elections "will not be decreased." *Id.* For example, if people who register to vote under the State's NVRA procedures are unaware that a separate registration is still required for state and local elections, they may forgo other registration opportunities in the belief they are already registered. Conversely, NVRA registrants who receive notice that they are not eligible for all elections, but only federal elections, may well stay home entirely if they do not fully understand the distinction, especially if federal and state elections are both on the ballot. Mississippi's recent history, moreover, illustrates that dual registration requirements have a disproportionate impact on the State's black voters. Brief for Appellants at 29-31 & n.11.

implement such a plan, Br. at 17-26; and two, that the Attorney General's grant of preclearance was an improper effort to change Mississippi statutory law and create a benchmark for retrogression. Br. at 28-31.

Both of these arguments reflect a misunderstanding of the nature of a Section 5 enforcement action such as this. In this action, the local three-judge district court did not have jurisdiction to determine whether the challenged procedures are or are not retrogressive, or for that matter whether they were motivated by a discriminatory purpose. The only issue before the court was whether the procedures constitute a change, not whether that change is discriminatory. Brief for Appellants at 25. Because Mississippi's current practices reflect a change -- whether measured against the pre-1995 system or against the NVRA procedures in use from January 1, 1995, through February 10, 1995 -- the legal status of the latter procedures is not dispositive of this appeal.

In any event, both of the State's arguments are incorrect. As to the first, the State contends that no change occurred when election officials stopped implementing the NVRA on a unitary basis and canceled the state-election eligibility of NVRA registrants, because unitary implementation violated state law and was merely the act of a "rogue official." Brief for Appellees at 21. In the first place, appellees have mischaracterized the actions of the Secretary of State's office. Ms. Constance Slaughter-Harvey was not a minor functionary, but the General Counsel to the Secretary of State and Assistant Secretary of State for Elections. Under Mississippi law, which appellees fail to cite, an Assistant Secretary of State has "the power and authority under the direction and supervision of the secretary of state to perform all duties required by law of that officer," and such officials are not civil service employees, but serve "at the will and pleasure of the secretary of state." Miss. Code Ann. §

7-3-71. Thus, her actions were those of the Secretary of State for the purposes of Mississippi law; obviously, the Secretary of State is not required personally to conduct all of the functions of his office.

Further, appellees are unable to reconcile their position with the holding of *Perkins v. Matthews*, 400 U.S. 379 (1971), which holds that changes in voting practices must be submitted for preclearance even when the change is required by state law. The City of Canton's argument in *Perkins* was no different from the State's argument here: Canton contended that the state legislature had the authority to prescribe the election system to be used by the city, and that no voting change occurred when the city simply corrected its previous illegal practice of using an election scheme barred by state law. *Id.* at 394 ("Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections"). To borrow the appellees' term, the Mississippi Legislature was the relevant "body politic" in *Perkins* no less than in this case.

Indeed, in *Perkins*, there was no evidence at all that any agent of the State itself had ratified or authorized the acts of the City of Canton that were contrary to Mississippi law, yet the illegality of Canton's acts under state law was held irrelevant to the Section 5 inquiry. Here, where state officials were directly involved in carrying out the practices alleged to be illegal under state law, the *Perkins* holding should apply with even greater force.

Appellees rely upon *United States v. St. Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1971), which holds that the illegal acts of vote-buying committed by three local election officials in one election district of one parish did not constitute "changes" administered by the state for the purposes of Section 5 coverage. As the *St. Landry* decision observes, Section 5

preclearance would be superfluous as applied to "voting procedures that a state does not wish to enact or administer." 601 F.2d at 864. That observation has no application here, because the State clearly *did* wish to administer its NVRA plan starting January 1, 1995, and that plan made changes in the State's registration procedures. Preclearance, therefore, was necessary.

St. Landry further holds that "[a] voting procedure need not have the seal of the state to come within § 5, but it must be more than these isolated instances of bargaining for votes." 601 F.2d at 865. Although the narrow exception recognized in *St. Landry* for isolated, obvious illegalities may be appropriate, it does not remotely fit the facts here. The actions in question are those of state officials and were widely publicized, not conducted surreptitiously in a voting booth. The Secretary of State was appointed by the Governor to coordinate the state's NVRA compliance, and was acting under state law that expressly provides for a unitary registration system, Miss. Code Ann. § 23-15-11 -- a policy that state officials, presumably, are not free to ignore. The unitary NVRA plan that the State now contends was unauthorized was developed by an Implementation Committee that included representatives of the legislature, the governor, the attorney general, and the secretary of state. That plan was widely publicized as going into effect on January 1, 1995 -- without awaiting action by the legislature. Brief for Appellants at 6-8. [7] Thousands of voters then actually

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[7] Appellees argue that the Secretary of State gave only "verbal advice" to implement the NVRA on a unitary basis. Brief for Appellees at 17; *see also* Br. at 19 ("No transcription or other reproduction of the actual communication has been presented in this proceeding"). But the Secretary of State's November 1994 manual, J.A. 26-49, which was distributed to circuit clerks and county election commissioners throughout the State, is obviously a written document. Although that manual does not

registered under that plan under the assumption of eligibility for all elections. J.S. App. 7a.

If Mississippi were free to disclaim such openly publicized, broadly administered acts by its election officials, even after thousands of voters have registered in reliance on the validity of the procedures, few registration practices short of an actual legislative enactment would be covered by Section 5. That would be at odds with the broad remedial scope Congress intended for Section 5. Neither *St. Landry* nor the other lower court decisions cited by appellees recognize an exception to the preclearance requirement that is broad enough to cover the widely administered, state-sanctioned implementation plan at issue here.[8] *Cf. Henderson v. Graddick*, 641 F. Supp. 1192

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expressly instruct circuit clerks to place NVRA registrants on the voter rolls for state and local elections, it also does not expressly instruct circuit clerks to place such registrants on the voter rolls for *federal* elections. The manual simply does not distinguish between eligibility for state and federal elections, and assumes that circuit clerks will process registration forms in their usual manner -- which under Miss. Code Ann. § 23-15-11 results in eligibility to "vote in all elections." The training sessions conducted for circuit clerks in 1994 simply reinforced the manual's instructions, which clearly assumed a unitary process. The voter registration forms themselves -- which obviously are written documents -- speak of "registering to vote," without mentioning any restriction to federal elections. *E.g.*, J.A. 46. Thus, appellees' attempted distinction between the procedures set forth in the November 1994 manual, and the so-called "verbal" advice concerning a unitary process, is artificial. *See also* R. 13, Defendants' Itemization of Facts, ¶ 10 (admitting that circuit clerks were advised by Secretary of State's office to register voters for all purposes beginning January 1, 1995).

[8] *See Miller v. Daniels*, 509 F. Supp. 400 (S.D.N.Y. 1981) (allegations by defeated candidate of irregularities in one election do not amount to covered changes); *Montgomery v. LeFlore County Repub. Exec. Comm.*, 776 F. Supp. 1142 (N.D. Miss. 1991) (same); *Beatty v.*

(M.D. Ala. 1986) (three-judge court) (when state Attorney General issued memorandum encouraging cross-over vote in primary, memorandum constituted a change subject to Section 5 preclearance notwithstanding illegality of Attorney General's action).

Appellees' second argument is based on a mischaracterization of appellants' position. Appellants do not contend that "Ms. Slaughter-Harvey's submission together with the Justice Department's letter of preclearance served to change Mississippi statutory law regarding registration for State elections." Brief for Appellees at 14. A preclearance determination does not create or change state law, but merely makes the precleared practice, whether instituted administratively or by statute, legally enforceable under Section 5. Here, the unitary NVRA system became a practice "*in fact* in force or effect" under *Perkins*, 400 U.S. at 395, not simply because of the Attorney General's preclearance determination, but because state officials actually implemented it.[9]

Esposito, 439 F. Supp. 830 (E.D.N.Y. 1977) (same); *Citizens' Right to Vote v. Morgan*, 916 F. Supp. 601 (S.D. Miss. 1996) (city resolution declining to place bond issue on ballot based on insufficient signatures was not covered change).

[9] Appellees contend that "[n]o one with the State Attorney General's Office was even aware that Ms. Slaughter-Harvey's submission to the Department of Justice had been made." Brief for Appellees at 7. Even if that assertion were supported in the record, it would be irrelevant, because *someone* had to make a submission of the changes being implemented on January 1, 1995. But the State's assertion is unsupported. Appellees' summary judgment motion included no affidavits asserting that the Secretary of State lacked authority to make the Section 5 submission, nor that the Mississippi Attorney General was unaware of the submission. At oral argument, counsel for the United States noted that the Justice Department had contacted the Mississippi Attorney General concerning the

Thus, regardless of whether Mississippi changed its statutory law, the State clearly made changes in its pre-1995 registration practices and procedures, and the State did not await action by the legislature before implementing those changes as of January 1, 1995. Mississippi therefore had to submit these new practices and procedures for preclearance, because Section 5 covers not only changes in statutory enactments, but also any "standard, practice or procedure" with respect to voting, and any changes that covered jurisdictions "shall enact or seek to administer." 42 U.S.C. § 1973c.[10]

Further, state law contradicts appellees' new claim, raised for the first time in this litigation, that circuit clerks are not agents of the state and are "answerable only to county voters." Brief for Appellees at 20. Appellees apparently wish to argue now that the unprecleared changes here are not the responsibility of the appellees, but should have been submitted by each individual circuit clerk. Such post-hoc denials of responsibility are nothing more than an effort to evade Section 5 review and should be rejected. Miss. Code Ann. § 23-15-223 provides that circuit clerks are appointed by the State Board of Election Commissioners to serve as registrars for elections in

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submission, and that the Mississippi Attorney General had expressed no objection to the Justice Department's consideration of the Secretary of State's submission. July 19, 1995 Tr. at 87.

[10] While appellees castigate the Justice Department and the State's own representative for creating "confusion" in the State's NVRA implementation, Brief for Appellees at 2, the responsibility for any such confusion rests squarely with the State itself. The State knew in mid-1993 that compliance with the NVRA was required as of January 1, 1995. The State could have taken up the question of NVRA legislation in its 1994 session and made a final decision on implementation in time to secure preclearance prior to the NVRA's effective date. The State's failure to do so is the State's responsibility.

each county. The State Board of Election Commissioners consists of the governor, the attorney general, and the secretary of state, Miss. Code Ann. § 23-15-211(1). Thus, while circuit clerks, to the extent they function as clerks of the circuit courts, are answerable to the voters, Miss. Const., art. VI, sec. 168, they are executive appointees and agents of the State Board of Election Commissioners in their capacities as registrars. *See also* Complaint at ¶ 13 (identifying defendant governor, attorney general, and secretary of state as members of State Board of Election Commissioners).

Appellees' denial of the obvious continues with their claim that "the February 10 memorandum was not a 'directive'" to circuit clerks and county election commissions. Brief p. 8. The February 10, 1995, memorandum, however, states that its purpose is "to offer additional direction to circuit clerks and county election commissioners as to how they should proceed." J.S. App. 20a. In light of the state statutes cited above, and the State's obvious practice of issuing guidelines to circuit clerks and county election commissioners through materials prepared by the Secretary of State and Attorney General, it is wholly incredible for the State now to claim that circuit clerks are not acting for the State in implementing the NVRA, and that any unprecleared changes are solely the responsibility of each individual circuit clerk.[11]

Finally, as noted above, it is clear that none of appellees' arguments concerning the "benchmark" status of the practices

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[11] Indeed, circuit clerks have no authority under state statutory law to exclude any registered voters from voting in state and local elections. Those directions came from the State's February 10, 1995, memorandum, just as the circuit clerks' practices from January 1, 1995 through February 10, 1995, were based on the materials and implementation manual prepared by the Secretary of State.

in effect from January 1, 1995, to February 10, 1995, would be dispositive of this appeal, even if those arguments were correct. The State is in violation of Section 5's preclearance requirement regardless of the status of the procedures that were in effect in Mississippi from January 1, 1995 through February 10, 1995. Even assuming the Secretary of State was wrong to implement NVRA procedures on a unitary basis and should not have submitted such a plan for preclearance in advance of action by the legislature, and even assuming that submission and the Attorney General's preclearance letter are treated as nullities, then Mississippi's current registration system still reflects a change from the last pre-cleared system, which was the system in effect prior to January 1, 1995. Mississippi therefore should, without further delay, submit its current procedures for Section 5 review by the Attorney General or the District Court for the District of Columbia.

CONCLUSION

The decision of the district court should be reversed, with directions to enter appropriate relief as previously described in appellants' opening brief. Brief for Appellants at 44.

Respectfully submitted,

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